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IN THE

Supreme Court of the United States

October Term, 1972

No.

CHARLES J. DEMOULIN, PATRICIA DEMOULIN, JEANNE E. SHANNON, BARBARA A. RUTHERFORD, SALLY SNELLING, WAYNE KNOX, VIRGINIA KUHN, and WILLEY SMITH,
Petitioners,

VS.

THE CITY AND COUNTY OF DENVER, a body politic and corporate; PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation; and JAMES T. BAYER, F. JAMES VOSS, and F. J. SERAFINI, election commissioners for THE CITY AND COUNTY OF DENVER,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado entered in this case on April 17, 1972.

Citations to Opinions Below

The opinion of the Supreme Court of Colorado is *DeMoulin v. City and County of Denver,* 495 P.2d 203 (Colo. 1972). As yet the opinion has not been printed in the official *Colorado Reports.* A copy of this opinion is printed in Appendix A.

Jurisdiction

The opinion of the Supreme Court of Colorado was dated January 24, 1972. Judgment was entered and rehearing was denied on April 17, 1972. No order granting any extension of time within which to petition for writ of certiorari has been entered. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(3).

Question Presented

Whether the City and County of Denver may constitutionally deny qualified electors who have not paid a property tax the right to vote on the question of granting a franchise to the Public Service Company of Colorado, in the absence of proof that the result of the election could have been different if all the electors who were not allowed to vote on the question of the franchise had been permitted to do so.

Constitutional and Charter Provisions

The provision of the *United States Constitution* that is involved is the equal protection clause of the Fourteenth Amendment. The provision of the *Colorado Constitution* that is involved is Art. XX §4. The provision of the *Charter of the City and County of Denver* that is involved is *Denver Charter* §C3.1. These constitutional and charter provisions are printed in Appendix B.

Statement

The petitioners are qualified electors of the City and County of Denver who owned no real estate and who, therefore, had paid no property tax to the City and County of Denver. Because the petitioners had paid no property tax, the City and County of Denver prohibited them from voting in a special election held on February 7, 1967 on the ques-

tion of whether the City and County would grant the Public Service Company of Colorado a 20-year franchise to use the public streets for the distribution of electricity, gas, and steam.

The Public Service Company of Colorado won the election by a vote of 66,566 to 10,035.

At the time of the election, 204,687 citizens were registered voters in the City and County of Denver. Of these 204,687 electors, 91,691 voted in the election. Of the 91,691 electors who voted, only 76,601 voted on the question of the Public Service Company franchise, 66,566 for it and 10,035 against it. Thus 15,090 electors were allowed to vote on the other propositions that were on the same ballot but not on the question of the Public Service Company franchise; these 15,090 electors presumably were not property taxpayers.

Before the election, the Public Service Company conducted a massive newspaper, radio, television, and door-to-door advertising campaign telling the electors that they had no right to vote if they were not property taxpayers. This intense publicity blanketed the City and County of Denver for several weeks.

On March 14, 1967, the petitioners filed a class action in the District Court for the City and County of Denver to void the election and to salvage their right to vote. On March 19, 1969, the trial court dismissed the petitioners' complaint. The petitioners perfected their writ of error to the Supreme Court of Colorado; the Supreme Court of Colorado affirmed the trial court. In its opinion dated January 24, 1972, the Supreme Court of Colorado stated:

> The trial court ruled . . . that relief of voiding the election could not be granted because there was

> no allegation and showing that, absent the illegality, the result would have been otherwise.
>
> We agree with this latter ruling, except that the allegation and showing need only be that the result *could* have been, and not *would* have been, otherwise . . . If the 15,090 who were not allowed to vote on the franchise had been permitted to do so, and all had voted against it, the franchise would still have been approved. [Italics by the Court.]

Meanwhile, the Supreme Court of the United States had decided *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 on June 16, 1969, *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 on June 16, 1969, and *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 on June 23, 1970. These cases held that the equal protection clause of the Fourteenth Amendment forbids states to discriminate between electors who have paid property taxes and electors who have paid no property taxes. The Supreme Court of Colorado, citing *Cipriano* and *Kramer* but not *Kolodziejski*, held that *Cipriano* and *Kramer* were not controlling because the petitioners had not proven that the outcome of the election could have been different if the City and County of Denver had not prohibited electors who had paid no property tax from voting. Thus the Colorado Supreme Court said that a city can deny electors who have paid no property tax the right to vote in all elections, except when such electors are able to go to court and prove that the result of the election could have been different if the city had not denied them the right to vote. The Supreme Court of the United States recognized no such limitation on the equal protection clause or on the right to vote in either *Cipriano*,

Kramer, or *Kolodziejski;* no language in either *Cipriano*, *Kramer*, or *Kolodziejski* even faintly suggested that the equal protection clause applies or that the right to vote exists only if someone can prove that his side could have won the election. The effects of the decision of the Supreme Court of Colorado, if upheld, are that 15,090 or more electors lost their right to vote on the Public Service Company franchise and that these voters will not have an opportunity to vote again on this question until Public Service Company franchise expires in 1987.

When Federal Question Raised

The petitioners raised the federal question in their complaint filed in the District Court for the City and County of Denver, State of Colorado, on March 14, 1967 and subsequently in their amended complaint and motion for new trial filed in the District Court for the City and County of Denver, State of Colorado, and again in their brief filed in the Supreme Court of Colorado.

Reasons for Granting Writ

This petition for writ of certiorari presents a substantial question of federal constitutional law not explicitly decided in *Cipriano*, *Kramer*, or *Kolodziejski*. The Supreme Court of Colorado in deciding this federal question read a new meaning into the equal protection clause by holding that propertyless electors have no right to vote unless they come into court after the election and establish that their ballots would have made a difference in the outcome. In principle, it is the same as if the City and County of Denver had said that 15,090 Negroes would be allowed to vote only if they could subsequently prove in court that their votes could have changed the result.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Colorado in *DeMoulin v. City and County of Denver*, 495 P.2d 203 (Colo. 1972):

GROVES, Justice.

The parties appear here in the same order as in the trial court. The plaintiffs sought to void a special election held on February 7, 1967. There a 20-year franchise was granted to Public Service Company of Colorado for use of the Denver city streets and public ways for the distribution of electricity, gas and steam. Trial was to the court, which, at the conclusion, dismissed the complaint. We affirm.

Colo. Const. art. XX, § 4 and Denver Charter § C3.1 describe the proper electorate for such an election as "qualified taxpaying electors." Only those who had paid a property tax to the City and County of Denver during the twelve months preceding the election were permitted to vote upon the franchise. Registered, non-taxpaying voters were permitted to vote upon other propositions on the ballot. There were 204,687 registered voters. Of these, 91,691 voted at the special election. There were 76,601 who voted as to the franchise matter and, presumably, the remaining 15,090 were not permitted to vote on that question. The franchise was approved by a vote of 66,566 to 10,035, with 56,531 more "for" votes than those "against."

The plaintiffs contend that the denial of the right to vote on the franchise by non-taxpaying electors is a denial of equal protection under the Fourteenth Amendment. While we do not reach the question, it is noted in passing that Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), and Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583

(1969), which are cited here in support of reversal, were announced subsequent both to the election and the trial court's determination.

The trial court ruled that Denver's election commission improperly defined the term "qualified taxpaying electors." It held, nevertheless, that relief of voting the election could not be granted because there was no allegation and showing that, absent the illegality, the result would have been otherwise.

We agree with this latter ruling, except that the allegation and showing need only be that the result *could* have been, and not *would* have been, otherwise. Suttle v. Sullivan, 131 Colo. 519, 283 P.2d 636 (1955); Clough v. Colorado Springs, 70 Colo. 87, 197 P. 896 (1921); City of Loveland v. Western Light and Power Company, 65 Colo. 55, 173 P. 717 (1918); and Todd v. Stewart, 14 Colo. 286, 23 P. 426 (1890). If the 15,090 who were not allowed to vote on the franchise had been permitted to do so, and all had voted against it, the franchise would still have been approved.

The plaintiffs have argued that advance advertising to the effect that non-taxpaying electors could not vote on the franchise caused many non-taxpayers to fail to go to the polls. These non-voters, they say, might have appeared and defeated the franchise. No showing was made as to how many of the registered voters were not taxpayers; nor was there any evidence that any persons were discouraged from voting by reason of the advance advertising. To be successful, plaintiffs would have to predicate their case upon these showings.

The plaintiffs contend that there was a stipulation between the parties, which eliminated the necessity for plaintiffs to show that the vote could have been different. Both in

their brief and in oral argument the plaintiffs referred to many folio numbers in the record at which such a stipulation could be found. We fail to find any such stipulation at the folio references or in the remainder of the record.

Judgment affirmed.

APPENDIX B

Constitutional and Charter Provisions:

(1) *U.S. Const.* amend. 14: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

(2) *Colo. Const.* Art. XX §4: "No franchise relating to any street, alley or public place of said city and county [of Denver] shall be granted except upon the vote of the qualified taxpaying electors . . ."

(3) *Charter of the City and County of Denver* § C3.1: "No franchise relating to any street, alley or public place of the city and county [of Denver] shall be granted except upon the vote of the qualified taxpaying electors . . ."

APPENDIX C

Portions of the Record Showing When Federal Questions Raised:

(1) Complaint filed in the District Court for the City and County of Denver, State of Colorado, on March 14, 1967:

> THIRD CLAIM FOR RELIEF . . .
>
> 2. If the Court determines "qualified taxpaying elector" as used in the Colorado Constitution, Ar-

ticle Twenty (20), Section Four (4) pertaining to franchise elections means only those qualified electors who paid an *ad valorem* tax in the twelve months next preceding the election, then that Colorado Constitutional requirement must fall as being in violation of the Fourteenth (14th) Amendment to the United States Constitution.

(2) Amended complaint filed in the District Court for the City and County of Denver, State of Colorado, on September 11, 1967:

. . . SECOND CLAIM FOR RELIEF . . .

I

If the Court determines that the phrase "qualified taxpaying elector" as used in Art. III §C3.1 of the CHARTER OF THE CITY AND COUNTY OF DENVER and Art. XX §4 of the *Colorado Constitution* means only qualified electors who have paid an *ad valorem* tax to the CITY AND COUNTY OF DENVER within the twelve months immediately preceding the election, then Art. III §C3.1 of the CHARTER OF THE CITY AND COUNTY OF DENVER and Art. XX §4 of the *Colorado Constitution* must fall because they contravene . . . the Fourteenth Amendment to the *United States Constitution.*

(3) Motion for new trial filed in the District Court for the City and County of Denver on March 31, 1969:

(3) The Court erred in refusing to enjoin the defendant City and County of Denver from issuing a franchise to the defendant Public Service Company of Colorado until the defendant City and

County of Denver holds a valid election on the issue of such franchise in which all persons legally entitled to vote on said issue are permitted to do so. . . .

(6) The Court erred in holding that the Court does not have the power or authority to annul or declare void an election except on a showing that said election was illegally conducted and that as a result of said illegality the true will of the majority was not expressed and that but for such alleged illegality the result of the elction [*sic*] would have been otherwise.

(7) The Court erred in holding that it was necessary for the plaintiffs to allege and prove that the size of the class they represented was large enough to affect the results of the franchise election if the class had been permitted to vote.

(8) The Court erred in holding that it did not have the power to provide any remedy for the disenfranchised voters in the absence of proof by the plaintiffs that if the election were held again the result would be different.

(4) Brief of the plaintiffs in error filed in the Supreme Court of Colorado on November 14, 1969:

II. SUMMARY OF ARGUMENT.

A. Did the defendants' restriction of the right to vote to property taxpayers deny the plaintiffs and other nonproperty taxpayers the equal protection of the law guaranteed by the *U.S. Const.* amend. 14 . . . ?

. . .

C. Must the plaintiffs, in order to secure their right to vote, be able to establish after the election that their votes would have changed the outcome?

Supreme Court, U. S.
FILED
SEP 8 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-64

CHARLES J. DEMOULIN, PATRICIA DEMOULIN, JEANNE E. SHANNON, BARBARA A. RUTHERFORD, SALLY SNELLING, WAYNE KNOX, VIRGINIA KUHN, and WILEY SMITH,

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a body politic and corporate; PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation; and JAMES T. BAYER, F. JAMES VOSS, and F. J. SERAFINI, election commissioners for THE CITY AND COUNTY OF DENVER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

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IN THE

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THE CITY AND COUNTY OF DENVER, a body politic and corporate; PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation; and JAMES T. BAYER, F. JAMES VOSS, and F. J. SERAFINI, election commissioners for THE CITY AND COUNTY OF DENVER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

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BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Colorado has not been officially reported but is unofficially reported at 495 P.2d 203 and is included as Appendix A to the

Petition. The findings and conclusions of the trial court, entered March 19, 1969, are attached as Appendix 1 to this Brief in Opposition.

JURISDICTION

The jurisdictional requisites are stated in the Petition.

QUESTION PRESENTED

Whether the Colorado state courts erred in dismissing a suit to void an election because the plaintiffs failed to allege and prove, as required by Colorado law, that the election result might have been different in the absence of the alleged illegality.

CONSTITUTIONAL AND CHARTER PROVISIONS INVOLVED

The pertinent provisions of the Constitutions of the United States and Colorado and of the Charter of the City and County of Denver are set forth at Pet. App. B.

STATEMENT

In this action, filed March 14, 1967, petitioners sought to invalidate a special election held February 7, 1967, at which the voters of the City and County of Denver approved the grant of a franchise to respondent Public Service Company of Colorado for use of the Denver city streets and public ways for the distribution of electricity, gas, and steam (Pet. App. A at 7; App. 1, *infra*, at 1a-2a.)

The issue was submitted to the voters pursuant to provisions in the Colorado Constitution (art. XX, sec. 4) and the Denver Charter (sec. C3.1) describing the electorate for such an election as "qualified taxpaying elec-

tors." Under those provisions, only voters who had paid a property tax during the preceding 12 months were permitted to vote, while registered voters who had not paid such taxes were permitted to vote only upon other propositions on the ballot. (Pet. App. 7; pp. 2a, *infra*). The restriction on the right to vote on the franchise question to property taxpayers was stated in the notice of the election, published 27 days before the election (Pl. Ex. B).[1]

Of 204,687 registered voters in the City and County, 91,691 voted in the election. Of these, 76,601 voted on the franchise question, and according to the court below the remaining 15,090 presumably were not property taxpayers and therefore were not permitted to vote. The franchise was approved by a vote of 66,566 to 10,035, a margin of 56,531 more votes "for" than "against." (Pet. App. A at 7; App. 1, *infra*, at 3a.)

On March 14, 1967, petitioners commenced this action to void the election and annul the franchise, on the ground, among others, that restriction of the right to vote to property taxpayers violated the Fourteenth Amendment to the United States Constitution. Petitioners commenced the action 62 days after publication of the notice of the election stating who would be allowed to vote; 35 days after the election itself; and not less than 18 days after the expiration of the ten-day period allowed by the Colorado statutes for contesting those elections that are subject to challenge (C.R.S. 1963 (1965 Perm. Supp.), 49-25-127). In the meantime, the fran-

[1] Petitioners assert in their petition that before the election Public Service Company "conducted a massive newspaper, radio, television, and door-to-door advertising campaign telling the electors that they had no right to vote if they were not property taxpayers," "intense publicity" that "blanketed" the City and County of Denver "for several weeks" (Pet. 3). That assertion is not supported either by a citation to, or anything in, the record, and is denied by respondents. See f. 325.

chise had become effective, and respondent Public Service Company had paid $68,000 to the City and County for election expenses and $1,110,000 for acquisition of street lighting facilities (Pl. Ex. B). In addition, by the time of trial, respondent Public Service Company had made franchise payments of $3,800,000 (f. 559).

The trial court dismissed the action pursuant to the findings and conclusions reproduced in Appendix 1 to this Brief in Opposition (pp. 1a-5a, *infra*). The action was dismissed as to petitioners Charles and Patricia DeMoulin because they had been allowed to vote and therefore were not affected by the voting restrictions they seek to challenge. The action was dismissed as to the other petitioners because those petitioners failed to allege and provide that the alleged illegality in the conduct of the election had an effect on its outcome.[2] (App. 1, *infra*, at 2a-4a.) In that connection, the margin of votes "for" over votes "against" (56,531) greatly exceeded the number of electors who voted at the election but did not vote on the franchise question (15,090). In addition, petitioners failed to allege or prove how many of the 112,996 registered electors who failed to vote at all had not paid property taxes and therefore would have been subject to the restriction challenged in the suit, although this figure can be developed readily from public records in Denver. (App. 1, *infra*, at 3a, 4a; Pet. App. A at 8.)

On appeal, the Supreme Court of Colorado affirmed. In the meantime, after the trial court decision, this Court had decided *Kramer* v. *Union School District*, 395 U.S.

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[2] Though the trial court held that it had no power to set aside the election, in light of petitioners' failures of pleading and proof, it also concluded that the respondent election commissioners improperly excluded registered voters who had not paid property taxes but had paid other taxes, such as the virtually universal sales tax, and announced that in future elections such persons should be permitted to vote. See App. 1, *infra*, at 4a.

621 (1969), *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), and *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970), invalidating restriction of the right to vote to property taxpayers. The Colorado court did not reach the Fourteenth Amendment question, however (Pet. App. A at 7), because petitioners had failed to show that the restriction could have affected the election outcome. In that regard, the court stated that "[i]f the 15,090 who were not allowed to vote on the franchise had been permitted to do so, and all had voted against it, the franchise would still have been approved" (Pet. App. A at 8). To be sure, petitioners had "argued that advance advertising to the effect that non-taxpaying electors could not vote on the franchise caused many non-taxpayers to fail to go to the polls" and those nonvoters "might have appeared and defeated the franchise."[3] The court rejected that argument too, however, stating that to be successful plaintiffs would have to show, among other things, "how many of the registered voters were not taxpayers." The court based its ruling on Colorado decisions governing pleading and proof in suits to invalidate elections. (Pet. App. A at 8.)

REASONS FOR DENYING THE WRIT

This application by the Colorado courts of the jurisdictional principle at issue does not warrant review by this court.

1. The decision below rests upon an adequate state ground—that a plaintiff who seeks to have an election set

[3] As noted previously, see n. 1, *supra*, there is nothing in the record to support petitioners' assertion in that regard. Indeed, Appendix A to Respondents' Brief in the court below (certified as part of the record here), shows that, of seven special elections held during the period from June 1964 through November 1967, the number of voters in the election at issue here was greater than in any other election, both in terms of total vote and in terms of percentage of registered voters voting.

aside must plead and prove that the illegality of which he complains could have affected the election outcome. Petitioners attack the adequacy of that state ground, claiming that it is in effect an invalid restriction on the right to vote. Thus, they say, the Colorado court held "that propertyless electors have no right to vote unless they come into court after the election and establish that their ballots" might have made a difference in the outcome (Pet. 5). However, the Colorado court held nothing with respect to the right to vote. Its holding, that a plaintiff who seeks to set aside an election must plead and prove the size of the class affected by the illegality of which he complains, does not impose an unreasonable burden on such a plaintiff and has no application whatever to a plaintiff who seeks declaratory relief as to the illegality of a restriction on the right to vote and preventive relief for the future. While petitioners suggest that the Colorado court's holding as to pleading and proof may conflict with this Court's decisions in *Kramer*, *Cipriano*, and *Kolodziejski*, none of those cases presented the question whether a state can require a plaintiff to show that the election result might have been different in the absence of the alleged illegality of which he complains. Indeed, in *Kramer*, the plaintiff did not seek to invalidate an election, and in *Cipriano* the plaintiff proved that the number of non-taxpayers barred from voting exceeded the margin in the election.[4] The fact is that the rule on which the decision below was based has been followed by virtually every court that has ever considered the question. See, *e.g.*, 26 Am. Jur. 2d, *Elections*, pp. 145-146 at n. 17; 29 C.J.S., *Elections*, p. 690 at n. 81; McCrary, *Elections* (4th ed.), §§ 235, 523-524; and cases cited.

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[4] The plaintiff proved that of 11,606 registered voters, 6,926 were nontaxpayers not eligible to vote under the restriction in question in the case, while the bonds in issue had been approved by a margin of only 932 voters. 286 F. Supp. at 829. Thus, the exclusion of nontaxpayers obviously might have affected the outcome.

2. Moreover, there are a number of additional procedural obstacles, under state law, to a decision on the merits of petitioners' constitutional attack on the conduct of the Denver election.—(a). Under Colorado law, a franchise can be challenged only in proceedings in the nature of *quo warranto* under Colorado Rule 106(a)(3), asserting the rights of the public, not in a private action asserting no interest other than that of the public generally. *Vickery* v. *Wilson*, 40 Colo. 490, 496-497, 90 Pac. 1034, 1036; *Denver & Swansea R. Co.* v. *Denver City R. Co.*, 2 Colo. 673.[5] Petitioners failed to comply with that requirement.—(b). Moreover, in cases in which Colorado law does allow private suits to contest municipal elections, the action must be commenced within 10 days after the vote canvass, which must be made no later than 7 days after the election. C.R.S. 1963 (1965 Perm. Supp.), 49-25-115, 49-25-127.[6] Petitioners did not file suit until 35 days after the election. (See p. 3, *supra.*) —(c). The action was instituted after respondent Public Service Company had made substantial outlays in reliance on the franchise. (See pp. 3-4, *supra.*) Accordingly, the action was barred by laches. *E.g.*, *McKnight* v. *Whipple*, 25 Colo. 469, 471, 55 Pac. 182, 183.

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[5] See also *People ex rel. Mijares* v. *Kniss*, 144 Colo. 551, 553, 554, 357 P.2d 352, 353, 354; *People ex rel. Barton* v. *Londoner*, 13 Colo. 303, 314, 22 Pac. 764, 768; *Williams* v. *People*, 38 Colo. 497, 88 Pac. 463.

[6] As we read C.R.S. 1963 (1965 Perm. Supp.) 49-25-125 *et seq.*, such suits are allowed only in cases in which the election of municipal *officers* is contested. Accordingly, the election involved in this case, to determine a municipal *question* submitted to the voters, is subject to challenge only through *quo warranto* proceedings, as we contend under subhead 2(a). But if section 49-25-125 *et seq.* is construed more broadly to allow private suits to contest the result in elections to determine municipal questions (see C.R.S. (1963 Perm. Supp), 49-25-51 (3)(c)), such a suit would be subject to the 10-day limitation set forth in section 49-25-127, with which petitioners failed to comply.

The court below did not reach these state procedural issues, although they were raised by respondent. The holding below as to petitioners' pleading and proof was sufficient to dispose of the case. These state procedural issues would have to be resolved before the merits of petitioners' constitutional attack on the election could be considered, however, in view of the familiar principle that constitutional issues should be decided only if the case is not subject to disposition on nonconstitutional grounds.

3. Finally, even if the constitutional issue presented by petitioners' attack on the Denver voting restriction could be reached in this case, that issue does not warrant review by this Court. The applicable constitutional principle—that the right to vote cannot be conditioned upon the payment of taxes—is now clearly established, in view of this Court's decisions in *Kramer*, *Cipriano*, and *Kolodziejski*. Reiteration of that principle in this case would add nothing to what the Court has already said on the subject. A decision with respect to the matter would not even be of any importance in Denver, for there is no reason to suppose that election officials in Denver will not comply with this Court's previous rulings.[7] As for this case itself, petitioners' claims are barred by this Court's determination that the holdings in *Cipriano* and *Kolodziejski* are prospective only and do not apply in a case like this one in which the authorization approved in the election was "legally complete" when those cases were decided and inequitable results would follow from retroactive application of the holdings in those cases. 395 U.S., at 706; 399 U.S., at 213-215.

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[7] In that regard, while subsequent events are of course not a matter of record, it is our understanding that since this Court's decisions in *Kramer*, *Cipriano* and *Kolodziejski*, Denver election officials have not enforced the voting restriction attacked by petitioners in elections to which it would apply if it were valid.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX



APPENDIX 1

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. B-99756 Div. 5

CHARLES J. DEMOULIN, PATRICIA DEMOULIN, JEANNE E. SHANNON, BARBARA A. RUTHERFORD, SALLY SNELLING, WAYNE KNOX, VIRGINIA KUHN, and WILEY SMITH, on behalf of themselves and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, a body politic and corporate, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, JOHN MACDONALD, DONALD M. NICHOLSON, and F. J. SERAFINI, formerly Election Commissioner, of the CITY AND COUNTY OF DENVER, and JAMES T. BAYER and F. JAMES VOSS, Election Commissioner for the CITY AND COUNTY OF DENVER,

Defendants.

FINDINGS, CONCLUSIONS OF LAW AND ORDER

THIS MATTER coming on to be heard upon the complaint of the above captioned plaintiffs, and after trial the Court having considered the stipulations of counsel, the evidence adduced by the parties, and having heard the statements of counsel;

THE COURT FINDS:

1. This is a proceeding brought by the plaintiffs on behalf of themselves, individually, and as a class action on behalf of all other persons similarly situated, which action seeks to void the results of an election held Feb-

ruary 7, 1967 at which election those voting on the question approved the grant of a franchise to Public Service Company of Colorado. Said franchise was submitted to a vote by an ordinance duly passed by the City Council of Denver. It was shown that at said election the plaintiffs Charles J. DeMoulin and Patricia DeMoulin, voted and that the remainder of the plaintiffs did not vote. Further references in the order to the plaintiffs are meant to mean only the plaintiffs other than Charles J. DeMoulin and Patricia DeMoulin.

2. The plaintiffs Jeanne E. Shannon, Barbara A. Rutherford, Sally Snelling, Wayne Knox, Virginia Kuhn and Wiley Smith were citizens and qualified electors in the City and County of Denver at all times pertinent hereto but such plaintiffs did not own real or personal property subject to taxation in the City and County of Denver, nor pay *ad valorem* taxes within the 12 months preceding said election, although said plaintiffs paid sales taxes and other taxes to the City and County of Denver during said period; said plaintiffs signed voter signature cards received in evidence as Exhibit B at said election and in completing the same checked the box opposite the phrase "Am a registered elector of this precinct" and did not check the box opposite the phrase "Am a registered property taxpaying elector of this precinct." It was not shown that these plaintiffs made any request to vote on the franchise question, or that any person requesting to vote was refused the right to vote on the franchise question, nor did such plaintiffs make any protest to the judges of said election; said plaintiffs voted only upon the issues submitted other than the franchise question appearing on the ballot, the franchise question being locked off in the voting machines; that the plaintiffs Charles J. DeMoulin and Patricia DeMoulin were permitted to and did vote upon the question of granting a franchise to Public Service Company of Colorado.

3. No allegation was made in plaintiffs' complaint nor was any evidence offered as to the number of registered electors in the City and County of Denver who *were not ad valorem* taxpayers, or that there was a sufficient number to have overcome the majority of votes case in favor of granting the subject franchise.

4. That at said election of February 7, 1967 a total of 91,691 persons voted; that at said election, in addition to the question of the approval of the franchise to Public Service Company of Colorado, other issues were voted upon by the electors; that only persons who were otherwise qualified as an elector and who, during the 12 months next preceding said election, had paid an *ad valorem* tax upon real or personal property situated within the City and County of Denver and owned by said persons were permitted to vote upon the question of the approval of the franchise to Public Service Company of Colorado. On that question the vote was 66,566 in favor of granting the franchise and 10,035 against granting the franchise.

5. That no allegation has been made and no proof has been tendered by the plaintiffs that if other than *ad valorem* taxpayers had been permitted to vote, the results of said franchise election would have been otherwise; and that to assume that such acts complained of affected the election results would be sheer speculation.

THE COURT CONCLUDES AS A MATTER OF LAW:

1. This Court does not have the power or authority to annul or declare void an election except upon a showing that said election was illegally conducted and that as a result of said illegality the true will of the majority was not expressed and that but for such alleged illegality, the result of the election would have been otherwise.

2. Plaintiffs purporting to represent a class of electors who were not *ad valorem* taxpayers did not allege or attempt to show the size of such class, or that it was sufficient in size to have affected the results of the subject franchise election if the class had been permitted to vote.

3. The vote in favor of granting the subject franchise was overwhelming and it would be an entirely unwarranted assumption to conclude as a matter of law that if the election were held again, the result would be otherwise. This Court is not authorized, and indeed, should not engage in speculation as to the effect of the irregularities complained of by plaintiffs in the absence of proof that such matters affected the outcome of the election.

4. Notwithstanding the foregoing, however, this Court is of the opinion and ruled in the course of these proceedings that the Election Commission improperly defined the term "qualified taxpaying electors" to exclude therefrom those persons who had paid sales and other taxes to the City and County of Denver even though they were not *ad valorem* taxpayers, and this opinion is rendered for the guidance of election officials in similar proceedings in the future.

5. In addition, the plaintiffs Charles J. DeMoulin and Patricia DeMoulin, should be dismissed from this proceeding inasmuch as they have not shown that any actions of the defendants deprived them of any rights which they have asserted and they have no justiciable interest in the outcome of this case.

THE COURT FINDS the issues herein joined in favor of the defendants and against the remaining plaintiffs and ORDERS the complaint of the plaintiffs dismissed, all parties to pay their own costs. March 19, 1969

BY THE COURT:

/s/ Julius Brooks, Jr.
Judge